No. 15,131

IN THE

United States Court of Appeals

For the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation,	*Appellant,*
vs.	
UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,	*Appellees.*
ATLANTIC MUTUAL INSURANCE COMPANY,	*Appellant,*
vs.	
STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA,	*Appellees.*
PACIFIC NATIONAL FIRE INSURANCE COMPANY,	*Appellant,*
vs.	
STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA,	*Appellees.*
UNITED STATES OF AMERICA,	*Appellant,*
vs.	
STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,	*Appellees.*
THE DOMINION OF CANADA,	*Appellant,*
vs.	
STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA,	*Appellees.*

Appeals from the United States District Court for the District of Oregon.

NSWER BRIEF OF APPELLEE UNITED STATES OF AMERICA.

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Appeals from the United States District Court for the District of Oregon.

ANSWER BRIEF OF APPELLEE UNITED STATES OF AMERICA.

The Government, as appellant herein, having filed its brief in support of its appeal from that portion

of the interlocutory decree of the District Court which granted limitation of liability, now, as appellee, in support of that portion of the interlocutory decree which denied exoneration from liability to Petitioner, files this, its answer brief herein.

QUESTIONS INVOLVED ON PETITIONER'S APPEAL FROM THE DECREE DENYING EXONERATION.

The Petitioner, in its brief in support of its appeal from that portion of the decree of the lower court denying exoneration, having admitted that "What happened to the PENNSYLVANIA is known only from her radiograms" (Pet. Brief, page 11), and "that the cargo claimants having proved the loss, the burden is on the Petitioner to bring itself within one of the exemptions, i.e., perils of the sea, act of God, act of the master, latent defects"[1] (Pet. Brief, page 9), the questions presented upon this phase of the appeal are:

(1) Whether the finding of the District Court that the sinking of the PENNSYLVANIA was not caused by a "Peril of the Sea" is supported by the evidence and not clearly erroneous.

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[1]Petitioner did not plead or urge in the District Court any claim of exemption on grounds other than peril of the sea, and its present references on appeal to "act of God, act of the master, latent defects" are probably thrown out as mere conjectures upon which Petitioner does not seriously rely. In *The FELTRE* (9th Cir.) 30 F.2d 62, 1929 A.M.C. 279, it was held that conjectures cannot take the place of proof. See also *Waterman v. United States S.R. & M. Co.* (5th Cir.) 155 F.2d 687, 1946 A.M.C. 997.

(2) Whether the finding of the District Court that the PENNSYLVANIA'S unseaworthiness at the inception of her voyage was the proximate cause of her sinking is supported by the evidence together with the presumptions and not clearly erroneous.

(3) Whether the finding of the District Court that the Petitioner failed to use due diligence to make the PENNSYLVANIA seaworthy at the inception of her voyage is supported by the evidence and not clearly erroneous.

In discussing the above questions separately the evidence and authorities supporting the District Court's findings will be cited, from which it will be found that such findings and all of them are not clearly erroneous within the meaning of opinions of the Supreme Court in *McAllister v. U. S.,* 348 U.S. 19, 99 L. ed. 20, 1954 A.M.C. 1999, and of this Court in *Permanente-Silverbow Colorado* (9th Cir.) 231 F. 2d 82, 1956 A.M.C. 695. In this connection, this Court had under consideration in *Bjornson v. Alaska S.S. Co.* (9th Cir.) 193 F. 2d 433, 1952 A.M.C. 477 the meaning of the words "clearly erroneous" as used in the Federal Rules of Civil Procedure, Rule 52(a), 28 U.S. Code, providing that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This Court in the opinion in that case by Judge Driver held that the expression "clearly erroneous" "* * * does not mean that the reviewing court shall determine from the record where the weight of the

evidence lies. It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence."

In applying the rule in this case the opinion in *Artemis Maritime Co. v. S.W. Sugar Co.* (4th Cir.) 189 F. 2d 488, 491, 1951 A.M.C. 1833, is most applicable, especially the following:

> "Whether Artemis exercised due diligence to make the vessel seaworthy is a question of fact. We can, accordingly, reverse the District Court here only if we hold the District Court's finding was clearly erroneous. We cannot so hold, therefore the judgment of the District Court must be affirmed."

See also *Pacific Portland Cement Co. v. Ford Machinery & Chemical Corp.* (9th Cir., 1950), 178 F. 2d 541, and *Lerner Stores Corp. v. Lerner* (9th Cir., 1947), 162 F. 2d 160.

ARGUMENT.

I.

THE DISTRICT COURT'S FINDING THAT THE STORM IN WHICH THE PENNSYLANIA SANK WAS NOT A "PERIL OF THE SEA" IS SUPPORTED BY THE EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

The District Court's finding that the storm in which the PENNSYLVANIA sank was not of such magnitude or so catastrophic as to constitute a "peril of the sea" is fully supported not only by the radiograms themselves but by the testimony of Petitioner's witnesses, including both Captain Dyer, the Petitioner's

Marine Superintendent (R. 2569-2570), and Mr. Vallet, who took Captain Dyer's place as Marine Superintendent while Captain Dyer was ill during the latter part of 1951 and the early part of 1952 (R. 189-191). Captain Dyer testified by deposition that he had masters papers, any tonnage, any ocean, that he had been at sea and had often sailed the North Pacific. At page 2582 of the Record, he testified as follows:

> "Mr. Levinson. From your experience as a Master Mariner and as Port Captain, a Force 9 wind with heavy and confused seas is nothing unusual in the North Pacific in January, is it?
>
> A. No."

Mr. Vallet, Petitioner's Marine Superintendent who had sailed as a Chief Engineer for 20 years (R. 139) testified (R. 180-181) that the welding in the freeports in the bulwarks was because of

> "Q. Heavy weather in the North Pacific or in the Gulf of Alaska?
>
> A. That is right",

and (R. 189),

> "A. Well, we have heavy weather damage on practically all the voyages".

When asked about the following weather (R. 190):

> "Force of winds 7 to 8, 8 and 8 to 9, seas described as follows, 'very rough west by south sea, long high west by south swell, very high swell, heavy confused west—heavy confused south to west swell, vessel rolling and pitching heavily at times, seas too rough to maintain original course * * *"

Mr. Vallet stated (R. 191):

> "A. That is just a vessel going through a regular storm which happens practically on all voyages."

The District Court's finding that the storm in which the PENNSYLVANIA sank was not a "peril of the sea" is also supported by the testimony of Captain Harry Johnson (R. 2432) where he stated that from his experience in sailing the North Pacific, bad weather could be expected along the Great Circle Route from Seattle to Japan in January with a force wind from 6 to 10 and sometimes up to 12 (R. 2432). To the same effect was the testimony of Captain Frederick Ulstad (R. 2215-2216).

The force of the winds was stated in the radiograms from the PENNSYLVANIA as "WINDS WNW 9. VERY HIGH WESTERLY SEA" (Exh. 127). According to the Beaufort Scale force 9 is a strong gale of 41 to 47 sea miles per hour. Of all the vessels in the area, sixteen in number, the closest to the PENNSYLVANIA was the KAMIKAWA MARU, which was approximately 100 miles from the PENNSYLVANIA, the other vessels being over 200 miles. The testimony of Captains of these vessels was that they encountered heavy weather in January crossings in the North Pacific. Captain Maeda, of the KAMIKAWA MARU, stated that he had seen storms of the same severity two or three times in his experience (R. 535), and that the only damages sustained by his vessel in the January, 1952, storm were damages to the bulwark rail and some engine damage

resulting from forcing the engines in going to the aid of the PENNSYLVANIA. He further stated that he had, on his winter crossings of the North Pacific, encountered winds of force 11 and once a wind of force 12.

Captain Mori of the KOTOH MARU, which was 182 (R. 1530) to 232 miles (R. 1506, 1533) distant from the PENNSYLVANIA, testified that the storm from January 7th through January 9th, was a big storm, (R. 1512): "Q. Big storm. A. Yes, but in winter times North Pacific Ocean, sometimes we expect the same kind of storm then", and further (R. 1513) that there was no damage caused to the KOTOH MARU. He also testified (R. 1517) that: "Q. Do I understand that after you had members of your crew tighten down, cinch up the battens, that you turned around and resumed your course. A. Yes." He further testified (R. 1519) that a seaworthy vessel, fully loaded could stand for such kind of weather, and that (R. 1515) he encountered the same kind of a storm on April 24th of 1952 with wind WSW of maximum force 11. Captain John W. McMunagle of the Canadian weather Ship STONETOWN (Referred to as Weather Station Papa) which vessel was approximately 205 (R. 1970) miles southwest of the PENNSYLVANIA on January 7th, 8th and 9th, 1952, testified (R. 1993):

> "Q. Captain what would you say would be the usual and expected weather for the vicinity of weather station PAPA in the winter months? A. Well, you can expect very rough seas and gales of varying degrees of intensity practically

throughout the winter. Q. Was there anything unusual or unanticipated about the weather conditions that existed in the month of January 1952 in the vicinity of the weather station PAPA? A. No."

He further stated (R. 1981) that on winter patrol in the same area on January 19-21, 1951, they had winds of up to Force 11 (R. 1980, R. 1982), and (R. 1973) that the STONETOWN suffered no damage up to January 11, 1952.

There is great similarity in the testimony of the witnesses in connection with the sinking of the PENNSYLVANIA and that of *The VESTRIS* (S.D.N.Y.), 60 F. 2d 273, 1932 A.M.C. 863, where the District Court in finding that the sinking of *The VESTRIS* was not occasioned by a "Peril of the Sea" referred to the testimony of witnesses as to the weather describing winds of force 9 and 10 and to the testimony of officers from some of the other vessels in the vicinity of *The VESTRIS,* as follows (p. 278):

> "Testimony too voluminous to analyze here in detail has been offered regarding the weather and the experiences of other vessels in the general vicinity of the VESTRIS. There is considerable variation in the descriptions of the weather and sea. All agree, however, that the wind increased during Sunday afternoon and was at its height Sunday evening and subsided soon after midnight; that on Monday morning the wind had gone down and the weather was fair, although there was a heavy swell. Third Officer Welland, who was called as a witness by the petitioners, testified that at 7:30 p.m. Sunday the wind was

between force 9 and 10 on the Beaufort scale, and that during the evening it increased to up to force 10, with a high sea running. Welland's testimony impressed me as being reliable and after considering all the testimony in this respect, I think his statement as to weather conditions is substantially correct. Officers from some of the other vessels in the general neighborhood of the VESTRIS, although none were very near, testified that the wind reached force 12 Beaufort scale. Whether they are right in this or not, no other vessel—and some of them were small—suffered any serious damage. U. S. Weather Bureau Officials who regularly prepare weather charts from radio reports from vessels and other sources described it as a severe Atlantic storm but not a hurricane. The weight of the testimony justified the conclusion that the storm which the VESTRIS encountered was no more severe than is reasonably to be anticipated at that season of the year on a voyage from New York to South America; it was not extraordinary and should not have caused serious difficulty for a stable well-found ship. It does not fully account for the loss of the VESTRIS which, in my judgment, was due to her not being in proper condition to pass through it safely and which she otherwise would have."

The opinions of the expert weather witnesses referred to in pages 33 to 50 of Petitioner's brief can be shortly dealt with, first by citing the case of *Sartor v. Arkansas Nat. Gas Corp.,* 321 U. S. 620, 88 L. ed. 967 at page 972, and the cases therein cited, in which Mr. Justice Jackson in referring to the testimony of expert witnesses states the general rule that:

> ". . . But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury or to a judge or to a statutory board." . . . (Citing many authorities, including the admiralty case of *The CONQUEROR,* 166 U. S. 110, 131, 41 L. ed. 937, 946.)

If the opinions of these experts although considered were not accepted by the District Court, there would be no error in so doing.

Next, in considering the testimony of the experts, is the fact that one of the experts, Dr. Rattray, the oceanographer, testified (R. 1584) that he investigated fifteen storms and that he knew of no report of the loss of any vessel in all of these storms, which covered the period from 1924 to and including the so-called Pennsylvania Storm in January, 1952, except the loss of the PENNSYLVANIA, which was the only vessel lost in that storm in which there were seventeen vessels reporting in the area.

In considering the weather to be expected in North Pacific crossings in January, two cases in the District Court of California should be noted: *The ARAKAN,* (D.C. California, Kerrigan, J.) 11 F. 2d 791, 1926 A.M.C. 191, and *The INDIEN* (D. C. Cal.) 5 F. Supp. 349, 1933 A.M.C. 1342 aff'd. (9th Cir.) 71 F. 2d 752, 1934 A.M.C. 1050, both involving storms in the North Pacific of as great a magnitude, if not greater, than that encountered by the PENNSYLVANIA. It was

held in both cases that the weather was to be expected and not a "peril of the sea". The language of Finding III (R. 74) is similar to that appearing in *The ARAKAN* decision which also shows that the so-called Pennsylvania Storm, if not actually anticipated, was of a kind to have been reasonably expected in January on trans-Pacific voyages over the Great Circle Route. In *The ARAKAN,* supra, the Court says:

> "Claimant's initial position is that the leakage resulted from 'heavy, tempestuous, and extraordinary' weather, amounting to a peril of the sea, which as such would be excused by the provisions of its bills of lading. This defense, to say the least, is without novelty; it is the carrier's best though least dependable friend. Judged by well-known and usually adopted tests, it must fail in this case, because it is apparent from the evidence that the weather encountered by the vessel, if not actually anticipated, certainly was of a kind reasonably to have been expected on a trans-Pacific voyage, and hence not a peril of the sea. Charlton Hall, 285 Fed. 640, 642; Benner Line v. Pendleton, 2 CCA, 217 Fed. 497, 503, affirmed, 246 U. S. 353. There was, in brief, nothing 'catastrophic' about it. Charlton Hall, supra; Rosalia, 2CCA, 264 Fed. 285, 288."

In *The INDIEN* (9th Cir.) 71 F. 2d 752, 1934 A.M.C. 1050, Judge Sawtelle in affirming the decree of the District Court (McCormick, J.) 5 F. Supp. 349, 1933 A.M.C. 1342, described the weather encountered by the INDIEN in her north Pacific voyage as follows:

> "On February 7, the ship ran into a North Pacific winter storm. The weather increased in

> severity on February 8 and 9. Moller, the first officer of the Indien, testified that on the latter date the velocity of the wind 'was along sixty miles (an hour) generally, and up to ninety miles in the gusts.' Capt. Moloney, a marine surveyor, with a third of a century of maritime experience, declared that on a North Pacific voyage in the winter months, a 'vessel is continually shipping heavy seas * * * on her deck,' that February is considered one of the three worst months in those waters, that 'there is nothing else to be expected except heavy gales,' and that it is 'a very stormy passage.' "

Judge McCormick in the District Court in his opinion, affirmed by this Court held that this weather described in the opinion above quoted was to be anticipated and held in effect that this did not constitute a peril of the sea saying at page 353 of 5 F. Supplement, 1933 A.M.C. at 348:

> "There is no satisfactory evidence that the seas that the Indien had encountered during the voyage were not to be expected on the North Pacific route at that time of the year. Mariners who had navigated there previously testified that many sea catastrophes had occurred there and that violent storms were to be anticipated. The damages cannot be attributed to dangers of the sea or to causes beyond the respondent's control."

Turning to the decision in the Second Circuit in the case of *The TURRET CROWN,* (2d Cir.) 297 Fed. 766, the Court there says, at page 776:

> "The court below found that the weather encountered was not exceptional, but was what was

to be expected on a North Atlantic voyage in February. The strongest wind recorded during the voyage was a strong gale. The log entries show a light wind in the afternoon and at night, the wind rising to a strong breeze in the afternoon and evening of February 25th, a moderate gale in the early morning of February 26th, and fresh to strong gale in the afternoon. The only evidence of exceptional weather on February 26th was the Weather Bureau at Whitehall street, in New York City, where the wind was stated to have a force of 81 miles per hour for five minutes only. No log entry on the ship shows this strong wind. The ship at that time was over 150 miles out to sea. During the three-day period—February 25th to 27th, inclusive—the highest wind velocity recorded in Philadelphia was 36 miles, and that at New Haven 41 miles. These latter records show the unreliability of the New York record as a guide for a ship this distance at sea.

"The mere fact that the vessel encountered heavy weather is no defense to the claims for damage to cargoes, if any defect or unseaworthy condition of the vessel existed. The Rosalia (C.C.A.) 264 Fed. 285. The real difficulty with the sea was in the inability to have the vessel under control, owing to her defective steering gear. It is significant that the first mention of seas coming aboard the vessel follows after the entry of trouble with the steering gear in the log. A vessel which is not under control, it is testified, will suffer more from the seas than a vessel which is under control. We see no excuse in the weather."

The case of *The TURRET CROWN* is so applicable in the present case as it particularly points to

the effect of the failure of the steering gear, it being therein pointed out that, like the advices in the radiograms from the PENNSYLVANIA, that in *The TURRET CROWN,* supra, "the first mention of seas coming aboard the vessel follows after the entry of trouble with the steering gear in the log. A vessel which is not under control, it is testified, will suffer more from the seas than a vessel which is under control."

In *The GEORGIAN,* 4 F. Supp. 718, 1933 A.M.C. 1540, aff'd by the Second Circuit in 76 F. 2d 550, 1935 A.M.C. 556, the District Court, in holding that a strong gale with wind force of 9 and a whole gale of wind force of 10 did not constitute a peril at sea, said (p. 725):

> "The vessel encountered two severe storms during the voyage, the first on March 28th, 29th, and 30th, when the vessel was north and east of Hatteras, and the second on April 6th, 7th, and 8th, when the vessel was 'considerably southeast' of the Newfoundland Banks. According to the estimate of the ship's officers, the first storm reached a wind force of nine, which is rated on the Beaufort Scale of Mariners as a strong gale—a wind velocity of forty to forty-eight miles per hour. The second storm reached a wind force of ten, a whole gale—a velocity of fifty-six to sixty-five miles per hour. During these storms the ship labored very heavily; constantly shipped heavy seas at the bow, stern, and amidships; and had to be slowed to half speed and hauled off her course for safety. The ship's officers testified that the second storm was one of the worst they had ever encountered." . . .

"Perils of the sea mean conditions which are so extraordinary or catastrophic as to overcome those safeguards by which skillful and diligent seamen ordinarily bring ship and cargo to port in safety, that is, conditions which could not have been foreseen in the exercise of reasonable prudence, or which could not have been guarded against by exertion of ordinary human skill and experience. The Rosalia (C.C.A.) 264 F. 285; The City of Dunkirk (D.C.) 10 F. (2d) 609; The Oakley C. Curtis (D.C.) 285 F. 612; The Edith (C.C.A.) 10 F. (2d) 684."

. . . "It is true that on the voyage in question this vessel encountered rough seas and high winds so that she rolled and pitched considerably and shipped heavy seas; but at this season of the year, following close upon the vernal equinox, such gales and seas as were encountered by this vessel were reasonably to be expected in North Atlantic waters. There is nothing so unusual or catastrophic about these storms as to excuse the vessel as for a peril of the sea. Respondents are therefore liable for the entire damage done by sea water in No. 4 hold."

In holding that the weather therein described was not a peril of the sea, the Supreme Court in *The EDWIN I. MORRISON,* 153 U. S. 199, 38 L. Ed. 688 (1893), states:

"It was for them (the carrier) to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated. We do not understand from the findings that the severity of the weather encountered by

the Morrison was anything more than was to be expected upon a voyage, such as this, down that coast and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have anticipated under the circumstances."

In *The WEST-KEBAR* (2d Cir.), 147 F. 2d 363, 1945 A.M.C. 191, cited in Government's opening brief at page 46, the weather conditions which were held not to constitute perils of the sea are described as follows:

"During the watch between 4 a.m. and 8 a.m. on January 11, the West Kebar's log records a wind force of 8 on the Beaufort Scale—39 to 46 miles—and for the watch from 8 a.m. to 12 m., '9-10'. Nine is a 'strong gale'—47 to 54 miles—; 10 is a 'whole gale' 55 to 63 miles . . .

"The case comes down to whether a ship proves that she is well found for a winter Atlantic voyage, when her stow breaks apart under such conditions. We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season."

See also *The VIZCAYA* (E.D. Pa.), 63 F. Supp. 898, 1946 A.M.C. 469, where the Court held (p. 903):

"The contention that the damage was occasioned by perils of the sea is, in my estimation, ill-founded. True, the weather at times was severe, but considering that the voyage involved crossing the North Atlantic in the winter season, it cannot be said that the weather encountered

was not to be anticipated. The weather was not 'catastrophic' or 'of such a nature' as to constitute a good exception in the statute or the bills of lading. The nature of the weather to be expected during February in the Atlantic is set forth in The Manual Arnus, D.C. S.D.N.Y., 10 F. Supp. 729, 1935 A.M.C. 786, which also determines that breakage of a deck rail is not decisive. Furthermore, that the worst weather encountered by the Vizcaya was expectable has already been judicially determined. Cf. *Ore. Steamship Corp. v. D/S A/S Hassell,* supra; *The CYPRIA* (R. Masso & Cia v. Cypria), D.C.S.D.N.Y. 46 F. Supp. 816, 1942 A.M.C. 985. As stated in *Weil, Inc. v. American West African Line (The WEST KEBAR)* 2 Cir., 147 F. 2d 363, at page 366, 1945 A.M.C. 191, at page 196, 'Even "whole gales"—are expected in such water at such a season'. See also, *The HOKKAI MARU,* D.C. S.D.N.Y. 17 F. Supp. 249, 1936 A.M.C. 1609; *The CITY OF KHIOS,* D.C.S.D.N.Y., 16 F. Supp. 923, 1936 A.M.C. 1291.

"The proper approach is indicated in *Societa Anonima, etc. v. Federal Ins. Co. (The ETTORE),* 2 Cir., 62 F. 2d 769, at page 771, 1933 A.M.C. 323, at page 326: 'Gales are likely at all seasons in the Atlantic, and this was at most not more. She should have been able to withstand it, else she was not reasonably fit for the duties she had undertaken, and was therefore not seaworthy. *The SILVIA,* 171 U.S. 462, 464, 19 S.Ct. 7, 43 L.Ed. 241; *The SOUTHWARK,* 191 U.S. 1, 8, 9, 24 S.Ct. 1, 48 L.Ed. 65'."

Summary of supporting evidence and authorities showing that the storm was not such as to constitute a "peril of the sea" within the Carriage of Goods by Sea Act.

The simple answer to Petitioner's arguments and its CONCLUSION REGARDING THE STORM (Pet. Br. 59, 60) is that as heretofore shown the evidence is clear that this storm in the North Pacific was not of such magnitude as to be unexpected. The evidence as hereinabove cited from Captain McMunagle of the STONETOWN (Weather Ship PAPA) (R. 1993), Captain Maeda of the KAMIKAWA MARU, the nearest ship or station to the PENNSYLVANIA (R. 535); Captain Mori of the KOTOH MARU, 182 (R. 1530) to 232 (R. 1506, 1533) miles from the PENNSYLVANIA all being that the storm was not unusual or unanticipated. That storms with wind force of "WNW 9" as described by the Master of the PENNSYLVANIA in his radiogram and even stronger weather are to be anticipated in a January passage of the Gulf of Alaska was even admitted by Mr. Vallet, Petitioner's Marine Superintendent (R. 190) and by Captain Dyer, the Petitioner's Marine Superintendent whose place Mr. Vallet took during the period of Voyages V and VI. Captain Dyer testified that "a Force 9 wind with heavy and confused seas is nothing unusual in the North Pacific in January, is it? A. No.", (R. 2582) which is supported by the testimony of Captain Harry Johnson (R. 2432) of expected winds from 6 to 10 and sometimes up to 12, and also to the same effect supported by testimony of Captain Frederick Ulstad (R. 2215-2216). Storms with winds of force 9 and 10, in which storm the

VESTRIS sank, were held not to constitute a "Peril of the Sea", with testimony of other vessels in the area being discounted with the remark by the Court; "Whether they are right in this or not, no other vessel—and some of them were small—suffered any serious damage" *The VESTRIS* (S.D.N.Y.) 60 F. 2d 273, 1932 A.M.C. 863. In *The ARAKAN* (D.C. Cal.), supra, 11 F. 2d 791, 1926 A.M.C. 191, and *The INDIEN,* supra, (D.C. Cal.) 5 F. Supp. 349, 1933 A.M.C. 1342, aff'd (9th Cir.) 71 F. 2d 752, 1934 A.M.C. 1050, it was held that storms even greater than that in which the PENNSYLVANIA sank are to be expected in the North Pacific in the winter months. See also *The TURRET CROWN,* supra, (2d Cir.) 297 Fed. 766, where Weather Bureau records were discounted and held of no evidentiary value as being too far distant from the vessel; *The GEORGIAN,* supra, 4 F. Supp. 178, 1933 A.M.C. 1540 aff'd by the Second Circuit in 76 F. 2d 550, 1935 A.M.C. 556; *The WEST KEBAR,* supra, (2d Cir.) 147 F. 2d 363; *The VIZCAYA,* supra, (E.D. Pa.) 63 F. Supp. 898; and *The EDWIN I. MORRISON,* 153 U.S. 199, 38 L. Ed. 688.

Petitioner may attempt to use the case of *Clarke et al. v. States S. S. Co.* (D.C. Cal.) 141 F. Supp. 706, 1956 A.M.C. 2056 with respect to the severity and extent of the storm. It will be noted that none of the cargo claimants were parties, that the decision was after the findings in this case, and that the characterization of the storm is directly in conflict with Judge Ling's decision.

From this testimony and the authorities supporting it, the District Court's finding that the storm in

which the PENNSYLVANIA sank was not a "Peril of the Sea", is not clearly erroneous.

II.

THE DISTRICT COURT'S FINDING THAT THE PENNSYLVANIA WAS UNSEAWORTHY AT THE INCEPTION OF HER VOYAGE AND THAT SUCH UNSEAWORTHINESS WAS THE PROXIMATE CAUSE OF HER SINKING IS SUPPORTED BY THE EVIDENCE AND NOT CLEARLY ERRONEOUS.

The Government, in its opening brief, fully discussed the privity and knowledge of the Petitioner concerning the unseaworthiness of the PENNSYLVANIA at the inception of her voyage with respect to:

(1) Crack sensitiveness to the expected cold temperatures and rough seas of the Gulf of Alaska on her Voyage VI in January 1952;

(2) The unseaworthy condition of the steering gears; and

(3) The violation of Title 46, Code of Federal Regulations, Sections 43.10-35, with respect to the security of the hatches and also the improper positioning of the deck cargo.[1]

Before discussing separately each of these factors of unseaworthiness culminating from the unseaworthiness of the PENNSYLVANIA at the inception of her voyage, which were found by the District Court

[1]Section 144.10-80 was not in effect in January 1952 and was inadvertently mis-cited in the Government's opening brief.

to have caused the sinking of the SS PENNSYLVANIA, attention is called to the fact that the PENNSYLVANIA sank in the Gulf of Alaska on January 9, 1952, four days after leaving her port of embarkation in weather to be expected which raises a presumption of unseaworthiness at the inception of the voyage, which has never been overcome by Petitioner. *Compagnie Maritime Francaise v. Meyer* (9th Cir., 1918), 248 Fed. 881; *The DEMOSTHENES* (4th Cir.), 189 F. 2d 488, 1951 A.M.C. 1833; *The T. J. HOOPER* (2d Cir.), 60 F. 2d 737, 1932 A.M.C. 1169, cert. denied 287 U.S. 662; *The SOUTHERN SWORD* (3rd Cir.), 190 F. 2d 394, 1951 A.M.C. 1518; *The IONIAN PIONEER* (5th Cir.), 236 F. 2d 78, 1956 A.M.C. 1750; see also *The OLANCHO* (S.D.N.Y.), 115 F. Supp. 107, 1953 A.M.C. 1040; *The CYPRIA* (S.D.N.Y.), 46 F. Supp. 816, 1942 A.M.C. 985, aff'd (2d Cir.), 137 F. 2d 326, 1943 A.M.C. 947. This presumption of unseaworthiness supports the finding of the District Court which finding is therefore not "clearly erroneous".

(1) The crack sensitiveness of the PENNSYLVANIA made the vessel unseaworthy for a voyage over the Great Circle in the cold temperatures and rough seas existing in the Gulf of Alaska during the month of January.

Finding V (R. 75-76) of the District Court, that the crack sensitiveness of the vessel to extreme cold weather was a factor of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage is supported by the evidence and not clearly erroneous.

The sensitivity of the steel plating of the PENNSYLVANIA is shown from the testing of the sample plate from the vessel where the 22-foot crack occurred, by Mr. Morgan L. Williams of the Bureau of Standards, who testified (R. 1868):

> " . . . Experience with ship plates and other tests conducted by other laboratories indicate that the 10-foot-pound transition temperature of the Charpy V-notched specimen is a pretty good indication of the temperature at which the steel is liable to be notch-sensitive.
>
> "Q. Would this plate here (referring to the sample plate from the PENNSYLVANIA) be sensitive in weather 30 to 40 degrees?
>
> A. It would." (Words in parenthesis added.)

The cold weather conditions of the Gulf of Alaska in January of any year can naturally be expected to be of low temperatures ranging from below freezing to forty or fifty degrees, and it is shown by Exhibit 91 that, at Ocean Station Peter (SS STONESTOWN) on January 9, 1952, the temperature was 32° F. From his twenty years of experience as a Chief Engineer and his knowledge of weather conditions in the North Pacific, the Petitioner's Marine Superintendent Vallet undoubtedly was aware and knew of these low temperatures in the Gulf of Alaska, the same being not only within his own experience but of common knowledge. In the Ship's Structure Committee's Report of 1946, which was known to Vallet and undoubtedly unknown to the master of the PENNSYLVANIA, it is shown that

the ESSO MANHATTAN (litigation concerning which was decided by the District Court, Southern District of New York, in 121 F. Supp. 770 at 774), split in two by reason of notch-sensitiveness in water temperatures of 38 degrees and air temperatures of 35 to 40 degrees. The fracture was of the brittle cleavage type showing that the ESSO MANHATTAN was notch-sensitive.

With respect to the warnings of the crack sensitiveness of the PENNSYLVANIA, it is first to be noted that Mr. Vallet testified (R. 263) that the 22-foot crack on Voyage V was the first instance that the vessel had cracked since the Petitioner took possession of her although it was brought to his attention that she had a number of minor cracks. It is to be noted further that the notation by Commander Rivard on February 13th of cracks on the main deck plate on the starboard side between Nos. 2 and 3 hatches, shows that they had appeared after the letter of February 7, 1951, from the Maritime Administration, which warned Petitioner against the conversion of the deep fuel tanks which cut off the equalizing trunks (R. 252), which included the cutting of hatch openings 16 feet long and 8 to 10 feet wide (R. 436), the Maritime Administration warning:

> "* * * Elimination of these trunks would definitely jeopardize the vessel * * *".

It is to be further noted that Mr. Vallet admitted (R. 275) that in some vessels:

> "they use methods of strengthening tank tops to strengthen the vessel against cracks".

The 22-foot crack was located just forward of the house near hatch No. 3 in the vicinity of the padeyes in which Commander Rivard found the previous cracks in February of 1951. The location of the 22-foot crack is described as being (R. 878):

> "On the starboard side, between frames 72 and 74, the deck plating cracked from a rivet on the afterside and forward side of the scupper, in the stringer plate, between Frames 73 and 74, running through deck plates A and B and ending approximately 11 inches into deck plate C. Crack is approximately 22 feet long."

The failure to repair cracks under padeyes (and it is to be noted that the 22-foot crack had its inception in an old unrepaired crack in a padeye) made the vessel unseaworthy according to Commander Rivard, who testified (R. 638):

> "Q. Where were these padeyes located in the fractures that were found?
>
> A. On this report dated January 30th under the pads—that is another report. In my report dated the 18th of February, yes, under the date of the 13th of February I make a note under that date, 'Additional work; main deck plate on starboard side between Nos. 2 and 3 hatches found fractured in way of two deck pads for heavy lift boom vang being removed' I went on to say there were two separate fractures, one on each side of the bulkhead.
>
> Q. One on each side of the bulkhead, you say?
>
> A. That is correct; they were separate fractures."

And he further testified as to these cracks (R. 647-648):

"Q. In other words, from your answer to my question I think you have stated that where there is a crack in the plates there it was an essential repair job, and as I understand it the vessel was not seaworthy until such repairs were made to those cracks; is that correct?

A. On the Main deck?

Q. Yes, on your padeyes.

A. Yes. When I use the expression in that case, it was a fracture that I had found, and it goes without saying that if in a case like that, if I find a fracture, it must be repaired before I can pass on it.

Q. Well, the vessel is not seaworthy until it is repaired is it?

A. That is correct.

Q. Sure?

A. That is correct."

There was also evidence that cracks were noted around padeyes near hatches 4 and 5 (R. 445). There was no close inspection made for cracks in the deck plating or any of the welds of the ship after the 22-foot crack, and the other small crack in its vicinity, had been repaired.

The testimony of Mr. Robert A. Hechtman shows that cracks in the vessel's deck plates (R. 2602) show evidence of extraordinary stresses on the vessel's deck and

"that in a welded structure I would consider those cracks as something dangerous."

There has been no adequate explanation from the Petitioner as to why the PENNSYLVANIA started its cracking after the deep tanks were converted, when there was no evidence of any substantial cracking prior to that time.

This evidence, including the Report of the Ship's Structure Committee which referred to the sinking of the ESSO MANHATTAN by reason of its notch-sensitiveness to cold temperatures and rough seas, supports the Finding of the District Court herein (Finding V, R. 75):

> "That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo.";

and such Finding is not clearly erroneous.

(2) All methods of steering having failed four days after the vessel left port, there is a presumption of unseaworthiness. This presumption has not been overcome.

The graphic words of the radiograms from the PENNSYLVANIA "CANNOT STEER * * * IF WE CANNOT FIX STEERING GEAR WILL RE-

QUIRE ASSISTANCE" (Exhibits 127 and 128) on the 4th day after leaving Seattle, raise a strong presumption of unseaworthiness which the Petitioner has failed to overcome. See pages 41 to 51, Government's opening brief, *The A.H.F. SEEGER* (2d Cir.), 104 F. 2d 167, 1939 A.M.C. 792; *In re Reichert Towing Line* (2d Cir.), 251 F. 214 at 217; *IONIAN PIONEER* (5th Cir.), 236 F. 2d 78, 1956 A.M.C. 1750; *The MEANTICUT-BEDFORD* (S.D.N.Y.), 65 F. Supp. 203, 1946 A.M.C. 178.

It was, furthermore, ascertained from Petitioner's witnesses that although the emergency steering gear became clogged with cargo (clothing) and the emergency steering gear freed, there were no safeguards against reoccurrence provided (R. 372), although hold No. 5, where the clogging occurred on Voyage V, was, on Voyage VI, fully stowed with cargo. It is also shown by the record (R. 688-689) that the main and hand steering gears were not opened up, cleaned, or inspected. In the four year inspection, it was testified that the pumps are opened up and fully inspected (R. 687) but there was no evidence that the pumps in the steering gear were ever opened up by the petitioner. The last time that they were opened up was in 1949 (Exhibit 147).

Although counsel for Petitioner admitted at the trial (R. 658):

> "Mr. Wood. * * * I would like to state to your Honor that it is one of the contentions against us that in this case that the steering engine was not good",

the testimony of the former Chief Engineer Mathews (R. 351) only states that he made inspections of the steering gear from time to time and inspections on every watch were made by the man oiling the steering gear. The insufficiency of this type of inspection is held in *The VISCAYA* (D.C.E.D. Pa.), 63 F. Supp. 898, 1946 A.M.C. 469. What these inspections were, whether the steering gears in these inspections were ever opened up, whether the valves and pumps were ever cleaned so as to prevent stoppage by foreign matter, or as to leakage in the telemotor, was not shown. There was no evidence as to whether the hand steering and the emergency steering were tested regularly or periodically or at all. Evidence of this lack of operation and testing of the emergency steering gear may be taken from the fact that it became jammed on Voyage V and upon complaint of a member of the crew, it was repaired by releasing the cargo which had jammed the control. Mr. Mathews, the former chief engineer, attempts to explain the situation (R. 376):

> "A. If the telemotor system went out and the wheelhouse control was down and the weather was bad enough, it would be taking seas sometimes over that afterhouse I wouldn't want to be steering up there myself. It is only a connection to the steering room anyway.
>
> Q. Just below you?
>
> A. And down below in the steering room you have a repeater compass down there and two trick wheels you can steer from. And if all your power is gone you have a hand wheel you can steer from."

The radiograms state "CANNOT STEER * * * IF WE CANNOT FIX STEERING GEAR WILL NEED ASSISTANCE". This means that all of these methods of steering failed. The presumption is therefore certain that proper testing, operation, cleaning and repairs of these multiple systems of steering were not made before the inception of the voyage and that the steering gears were in fact unseaworthy at the inception of her voyage. If the tests, inspections and repairs had been made it was the duty of Petitioner to come forward and show them; but although placed on notice of the contentions that the steering engines were not good, it failed to supply the proof, if it had any, of the proper inspections and trial operations.

The opinion in *The FRIESLAND* (S.D.N.Y. 1900) 104 Fed. 99 is applicable to this situation, where in that case the Court says:

> ". . . The evidence taken by commission as respects the kind of inspection made is brief and unsatisfactory. It does not appear that the chest was ever taken out for examination from the time it was put in some nine years previous to this damage, or that the valve itself, was taken out for the purpose of seeing better how great was the wear at the bottom."

The Court, itself, can realize the effect of the failure of the steering gear in the storm, and that the real complaint of the master was the inability to steer and not the weather. In *The TURRET CROWN* (2d Cir.), 297 Fed. 766, the Court says:

> "It is significant that the first mention of seas coming aboard the vessel follows after entry of trouble with the steering gear in the log";

and in *The TENEDOS* (S.D.N.Y.), 137 Fed. 443 aff'd (2d Cir.) 151 Fed. 1022, the Court said:

> "Evidence was given for the Tenedos by three experienced captains, which is claimed to show that there was as much examination of the ports made in this case as on other vessels. *But the fact that shipowners are not in the habit of using precautions which would demonstrate unseaworthiness is immaterial. They are bound to use them.* The Edwin I. Morrison, 153 U.S. 217, 38 L. Ed. 688." (Italics supplied.);

and in *The CYPRIA* (S.D.N.Y.), 46 F. Supp. 816, 1942 A.M.C. 985, aff'd (2d Cir.), 137 F. 2d 326, 1943 A.M.C. 947, the Court says:

> ". . . The fact that this rivet had caused no trouble up to this time does not indicate that it was sound, but merely that its weakness had not been discovered. The Cypria was not reasonably fit to carry the cargo which she had undertaken to transport and therefore was not seaworthy. The Silvia, 171 U. S. 462, 43 L. Ed. 241."

From the radiograms, it can be easily pictured that the vessel, having lost steerageway, being unable to steer, was wallowing in the trough of the sea, the crest of the waves pounding down on the deck taking the insecure hatch coverings and tarpaulins off the hatches, and filling the cargo holds, stowed with grain, full of water which could not be pumped out, and

finally resulting in the vessel going down bow first, with a total loss of vessel, crew and cargo. With this picture in mind, it is apparent that this finding of unseaworthiness was not clearly erroneous.

(3) The PENNSYLVANIA was unseaworthy by reason of her violation of the hatch security regulations, 46 Code of Federal Regulations, Section 43.10-35, and unseaworthy positioning of her deck cargo.

The District Court in Finding V, in referring to the "faults, failures, breakdowns and defects" set forth in the preceding Finding IV, of course included the contributory factors responsible for the sinking of the SS PENNSYLVANIA,

> "that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches and that the No. 2 hatch was open and full of water."

The unseaworthiness of the PENNSYLVANIA with respect to the securing of her hatches and the improper positioning of cargo on the forward decks, with citation of authorities, is discussed in the Government's opening brief in pages 51 to 59, inclusive.

By inadvertence, the Government, in its opening brief referred to and quoted from Title 46, Code of Federal Regulations, Sec. 144.10-80, which was not in effect at the time of the PENNSYLVANIA'S sinking. The appropriate regulation, upon which the Government relies, is the more specific regulation at Title 46, C.F.R. Sec. 43.10-35 which reads:

> "*Battens and Wedges.* Battens and wedges are to be efficient and in good condition."

In the Government's opening brief, the testimony showing the defective condition of the battens in the forward hatches was pointed out and reviewed. Under the authority of the decision of this Court in *The DENALI,* 105 F. 2d 413, 1939 A.M.C. 930, the evidence in this case requires the application of the Pennsylvania Rule (*The PENNSYLVANIA,* 19 Wall. 125, 22 L. ed. 148), which holds that where there is a violation of a statute:

> ". . . The rule simply is that the violator is penalized with the *burden of showing that the violation not only probably did not cause the accident, but that it could not have done so.*" . . . (Italics supplied.)

This Rule has been repeatedly followed in this Circuit. *The PRINCESS SOPHIA,* (9th Cir.) 61 F. 2d 339, 347; *The CHICAGO SILVERPALM,* (9th Cir.), 94 F. 2d 754. With the uncontroverted testimony of three members of the PENNSYLVANIA's crew for Voyage V establishing that the cross-battens on the forward hatches, including Hatch No. 2 which filled with water, were bent and buckled (R. 2081, 2094, 2095, 2100 and 2101), it is submitted that the Petitioner did not show that this violation of the regulations "not only probably did not cause the accident, but that it could not have done so". The improper positioning of the heavy trailers on the forward decks, lashed by chains to the padeyes, and the stowage of the acid cargo by No. 2 hatch, which, as stated in the radiograms, had its covers torn off by the drifting cargo, and filled with water, also support the finding

of the District Court. It is apparent that this finding of unseaworthiness is not clearly erroneous.

PETITIONER'S EXPERTS ON SEAWORTHINESS.

In answer to Petitioner's contention on pages 72 and 73 of its brief, that the PENNSYLVANIA was seaworthy at the inception of her voyage, first, because of the testimony of the many expert men who examined her and whose responsibility it was, the Government has cited many cases in its former brief holding that diligence in obtaining certificates of seaworthiness is not the test of due diligence. *The VESTRIS* (S.D.N.Y.) 60 F. 2d 273, 1932 A.M.C. 863; The *EDGAR F. CONEY AND TOW* (5th Cir.), 72 F. 2d 490, 1934 A.M.C. 1122, 1127; *COMPAGNIE MARITIME FRANCAISE v. MEYER* (9th Cir.) 248 F. 881; *BANK LINE v. PORTER* (4th Cir.) 25 F. 2d 843, 1928 A.M.C. 761; *The FELTRE* (9th Cir.) 30 F. 2d 62, 1929 A.M.C. 279; *The NINFA* (D.C. ORE. 1907) 156 Fed. 512.

The examination by E. D. Tucker, Roy E. Knowles and F. P. Miller at the condition survey, was at a time before the cracks were discovered by Commander Rivard around No. 2 and No. 3 hatches in the padeyes. Surveyor Miller, who attended at the annual inspection in August, 1951, did not examine or inspect the internal parts of the steering gear, simply stating that he (R. 411) "examined the steering arrangements, which consisted of the telemotor, hydraulic pumps,

drive motors emergency gear," but did not testify that they were opened up or as to their internal condition or what his examination consisted of, made no inspection under the padeyes for cracks and no inspection of the battens and turnbuckles on the hatches. The fourth named expert Commander Rivard, testified that he found cracks in the deck in February, 1951, in the padeyes near hatches No. 2 and No. 3 (R. 638), and that until such cracks were repaired, the vessel was unseaworthy (R. 648). John D. Gilmore, testified that the vessel was unseaworthy for Voyage VI with the acid cargo positioned on deck near the No. 2 hatch (R. 2301). Lieutenant Rojeski testified only to a manual test of the steering gear and made no tests or examination of the padeyes for cracks. Commander Hamilton, of the Coast Guard, described the inadequate manual tests which they made of the steering gear and stated that the internal parts of the steering gear and her pumps were not opened up (R. 689). This shows that the internal parts of the steering gear, with its valves and pumps, were not cleaned of foreign matter. Furthermore, Commander Hamilton made no examination of the deck for cracks under the padeyes.

Harold R. Pratt, of the American Bureau of Shipping, examined the 22-foot crack at Portland with Vallet and the repairs after they were made. He only examined the two padeyes, the one in which the 22-foot crack occurred on the starboard side, and the one on the port deck the padeye of which was removed and an insert placed in the deck. He saw the crack in the padeye on the port side which was visible (R. 906),

his inspection being only in November 1951. Captain Endresen made an examination of the 22-foot crack in November, 1951, and made his report on the fracture with a little diagram (Exhibit 65). He made no other examinations. Captain Bennett examined the 22-foot crack before and after it was repaired (R. 1130) and he only examined the area of the 22-foot crack in November, 1951. Kenneth Webb, a surveyor for the Board of Marine Underwriters, surveyed the damage and repairs to the 22-foot crack (R. 1122), never having seen the vessel prior to that time (R. 1124) described the 22-foot crack as a Class I casualty (R. 1125), did not examine any other parts of the vessel for damage (R. 1127), and did not inspect the holds because they were loaded with cargo (R. 1128). Mr. K. C. Sloan, of the Albina Engine and Machine Works, had only to do with the repair of the 22-foot crack and the removal of the padeye and the crack thereunder on the port side of the deck making no examination of the other padeyes and his testimony only concerned the making of repairs according to specifications (R. 865). The testimony of J. D. Wilson, surveyor for the American Bureau of Shipping, was that he examined the vessel on drydock on December 22, 1951, and made his survey report of such drydock examination (Exhibit 57). Mr. Wilson did not testify concerning the steering gear or any inspection of the *innards* thereof, the valves or pumps, and there is no evidence that the steering gear was opened up and examined. There was no testimony that Mr. Wilson had been advised fully of the 22-foot crack on the

starboard side of the deck and the small crack on the port side, both under padeyes, nor that he inspected any of the padeyes on the vessel's deck. Mr. James F. Goodrich was the Assistant General Manager of Todd's, and only examined the hull of the ship, making his examinations in January and December 21st, 22nd, of 1951. His testimony mainly concerned the question of there being a hog in the bottom of the vessel. He stated (R. 2823), that he did not make examinations to determine seaworthiness, and that (R. 2824), he did not recall that they had an order on the steering engine.

It is therefore apparent that no inspections were made of any of the padeyes after the 22-foot fracture other than that particular padeye on the starboard side and the padeye on the port side near hatch No. 3 on completion of Voyage V. The testimony of the experts shows that they, and the Petitioner's officers, and in fact no one, made an examination of any of the padeyes, other than the two near hatch No. 3 which were repaired in November, 1951, although Commander Rivard had stated that any fractures under the padeyes which were not repaired made the vessel unseaworthy.

With respect to the contention of Petitioner that her navigation of the seas for eight years, the last five on this very trans-Pacific route where she was wrecked, evidenced her seaworthiness, the simple answer is the fact that she did not survive Voyage VI in weather to be expected, and that as stated by the Second Circuit in *The TURRET CROWN* (2d Cir.),

297 Fed. 766, "The real difficulty with the sea was in the inability to have the vessel under control, owing to her defective steering gear."

With respect to many of the officers and some of the crew remaining on the ship, this does not evidence seaworthiness. The Chief Engineer did not remain on the ship and several others failed to rejoin. The further proposition that the vessel survived through Pennsylvania Storm No. 1 and Storm No. 2, is no test of her seaworthiness, as all of the other sixteen vessels, some of which were much smaller, as stated in *The VESTRIS* (S.D.N.Y.) 60 F.2d 273, 1932 A.M.C. 863, survived with little or no damage. The vessel was simply crack sensitive to the cold weather of the Gulf of Alaska. She suffered the crack which was to be anticipated from her crack sensitiveness. Her steering gear was faulty, allowing her to be thrown in the trough of the sea and at the mercy of the storm, the insufficient hatch coverings failing to hold the hatch covers on when the improperly positioned deck cargo came adrift and tore them off.

SUMMARY OF EVIDENCE AND AUTHORITIES SUPPORTING DISTRICT COURT'S FINDING THAT THE PENNSYLVANIA WAS UNSEAWORTHY AT THE INCEPTION OF HER VOYAGE.

Summarizing the Government's position that the evidence and the authorities fully support the District Court's finding that the PENNSYLVANIA was unseaworthy at the inception of her voyage, and that such unseaworthiness was the proximate cause of her

sinking, it is, first of all, to be noted that four days after leaving the port of Seattle, the PENNSYLVANIA sank. The causes of her sinking are admitted by the Petitioner to be set forth in the radiograms from the vessel. The radiograms state three distinct causes for the PENNSYLVANIA's loss:

First, 14-foot crack down into the engine room between frames 92 and 94;

Second, "Unable to steer. If we cannot fix steering gear will require assistance";

Third, "Deck load adrift taking tarpaulins off hatches and that hatch was open and No. 2 hatch full of water."

The District Court in Finding IV held that these were contributing factors responsible for the sinking of the PENNSYLVANIA, and in Finding V, that these faults, failures, breakdowns and defects were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions, and proximately caused her sinking.

With respect to Finding IV, the Petitioner on page 63 of its brief, admits:

> " . . . That they were 'contributory factors responsible for the sinking of the SS PENNSYLVANIA'; as stated in Finding IV, can hardly be denied. That they were 'factors of unseaworthiness' at the time of her sinking is, in a sense, true too."

Petitioner, however, raises a question as to whether these factors were the result of her condition when the PENNSYLVANIA left the dock in Seattle. The previous cracks in the padeyes near No. 2, No. 3, No. 4 and No. 5 hatches culminated in the 22-foot crack in the padeye near No. 3 hatch forward of the house. This was an old crack which had not been repaired. All of these cracks were discovered after the deep fuel tanks were converted for the carriage therein of dry cargo. Not only were large hatches cut in the deep tanks but the equalizing trunks were eliminated against the warning of the Maritime Administration. It was emphasized by all of the experts that cracks were caused by stresses. It was also admitted by Mr. Vallet that strengthening of tank tops was made in some vessels to prevent cracks in the deck.

The report of the sinking of the ESSO MANHATTAN, in the Report of the Ship's Structure Committee in 1946, was a warning of the crack sensitiveness of the PENNSYLVANIA so as to prevent her use in the cold temperatures and rough seas of the North Pacific.

With respect to the failure of the steering gear, the unseaworthiness of the vessel in that regard can be simply summarized by the fact, as stated in many authorities, that the failure of this vital machinery four days after the vessel left port raises a presumption of unseaworthiness. The failure to use any proper tests, opening up of the steering gears, cleaning the steering gears, or even showing periodical manual op-

eration of the hand steering and emergency steering gear, raises a presumption that the steering gears were not in proper condition at the inception of the voyage. This was evidenced by the failure of the emergency steering gear on completion of Voyage V brought to the attention of the Coast Guard by a member of the crew.

The deck cargo coming adrift, taking off the tarpaulins and hatch covers, in view of the previous experience of damage caused by deck cargo, showing the improper positioning of the deck cargo, together with the failure to show compliance with the Hatch Security Regulations, support the finding of unseaworthiness in that regard.

It is submitted that the finding of the District Court of the unseaworthiness of the PENNSYLVANIA at the inception of her voyage is supported by the evidence and not clearly erroneous.

III.

THE DISTRICT COURT'S FINDING THAT THE PETITIONER FAILED TO USE DUE DILIGENCE TO MAKE THE PENNSYLVANIA SEAWORTHY AT THE INCEPTION OF HER VOYAGE IS SUPPORTED BY THE EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

The discussion in the Government's opening brief of the privity and knowledge of the Petitioner, through its Marine Superintendent Vallet, of the many faults, failures, breakdowns, defects and crack sensitiveness found by the Court as "factors of unsea-

worthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage" supports the finding of the District Court that the Petitioner did not use the due diligence required by law to make the vessel seaworthy at the inception of her voyage.

The Petitioner, by the exercise of due diligence could have ascertained, if in fact it did not actually know through its Marine Superintendent, that the PENNSYLVANIA was crack sensitive to the cold temperatures and rough seas of the Gulf of Alaska in January of 1952, that the steering gears were faulty, needing cleaning and repair, that the deck load was improperly positioned, and that, by reason thereof, she was not seaworthy to successfully meet the cold temperatures and storms expected and actually met on her Voyage VI. The Petitioner is therefore placed on the horns of a dilemma. On the first horn of the dilemma, if Petitioner failed to exercise due diligence to ascertain the seaworthiness of the PENNSYLVANIA at the inception of her voyage, Petitioner would be liable under the Carriage of Goods by Sea Act, which requires the exercise of such due diligence. On the other horn of the dilemma, it is apparent that if Petitioner had proved that it had used due diligence to ascertain the actual condition of the PENNSYLVANIA with respect to her crack sensitivity, her faulty steering gears, her broken and bent battens, and the improper positioning of her deck cargo, then Petitioner must have found that the PENNSYLVANIA was not fit to meet the conditions

to be expected on her voyage and, in sailing the vesse in such a known unseaworthy condition, it could no escape liability.

All of the Petitioner's experts and its own em ployees admitted that even after the finding of th cracks in padeyes in the vicinity of hatches 3 and by Commander Rivard, who stated that until repaired the ship was unseaworthy, there was no inspection o other padeyes. This undoubtedly resulted in the 22 foot crack, which had its inception from an old crack in the padeye according to Mr. Williams of the Bu reau of Standards (R. 1859). And even with this warning and knowledge no inspections were made o any of the butt welds or of any of the other padeyes prior to sailing the PENNSYLVANIA on her Voy age VI. And with this history of cracks, together with the Ship Structure Committee's report of 1946 before Mr. Vallet, showing what happened to the ESSO MANHATTAN and the apparent notch sensitivity of the SS PENNSYLVANIA to low temperatures, she was sailed on the Great Circle Route where she met what could really be called her "predetermined fate." It needs no authority or further evidence to show that Petitioner has not used due diligence to determine seaworthiness, as it already knew that the PENNSYLVANIA was not able to meet the expected and to be anticipated low temperatures and heavy seas of the Gulf of Alaska.

The steering gears having failed four days after the departure of the vessel from Seattle, the vessel was thereby presumptively unseaworthy at the incep-

on of her voyage. In attempting to show due diligence in making the vessel seaworthy, the Petitioner's witnesses actually disclosed that there was only visual inspection of the steering engines and an operating test with no inspection of the interior workings of the steering gear or of its valves or pumps.

The opinion of Judge Learned Hand in *W. R. Grace & Co. v. Panama R. Co.* (S.D.N.Y.) 285 Fed. 718 aff'd (2d Cir.) 285 Fed. 718, is in this instance very applicable. In speaking of leaks around the sea valves which were covered by boxes where inspection did not include the taking off of the boxes and examining the valves before the voyage was commenced, Judge Learned Hand there states:

> "In such cases the ship has the laboring oar, and must show that she could not reasonably have avoided the loss, and I think she has failed. I cannot think that under the circumstances it was sufficient precaution merely to look below the boxes and note that no leaks had as yet developed substantial enough to leave signs after the water had presumably dried. Had the whole fixtures been in apparently good condition, they could hardly have become so dilapidated in a single voyage, with no heavier weather than that encountered. * * * It does not seem to me, however, that after the space of six months [after dry dock] it was safe to ignore such fixtures, boxed in as they were, and constantly subject to the twists and strains due to the movements of the parts of a ship with relation to each other."

In *The CYPRIA* (S.D.N.Y.) 46 F. Supp. 816, at 819, 1942 A.M.C. 985, aff'd (2d Cir.) 137 F. 2d 326, 1943

A.M.C. 947, in holding that due diligence had not been proven with respect to the examination of the vessel's plates the Court said:

> "The fact that this rivet had caused no trouble up to this time does not indicate that it was sound, but merely that its weakness had not been discovered.
>
> * * * * * * *
>
> A visual examination of the crack described would not be likely to disclose the condition of each rivet. No hammer or other specific test was made of the rivets, nor is there proof that any such tests had been made during the entire period between the time she was built and the voyage in question."

The visual inspection of the steering gear and the failure to open up the steering gear, its valves and pumps (R. 687-689) are not sufficient to comply with the duty of due diligence as stated in *The CYPRIA,* supra, for such visual inspection is not:

> ". . . of such character as to make reasonably sure that they are in condition to transport the cargo without damage, except from inevitable dangers. The shipper is entitled to this. If the vessel owner fails in this duty it and not the cargo owner assumes the risk of damage."

The presumption of unseaworthiness of the steering engines, arising when the three systems all failed, four days after leaving port, is emphasized by the decision in the Second Circuit, in the case of *The A.H.F. SEEGER,* 104 F. 2d 167, 1939 A.M.C. 792 (cited at page 45 of Government's opening brief).

There the Second Circuit emphasizes, at page 168:

"* * * it is common knowledge that the breaking of machinery as a result of which damage occurs, is not normal. * * *"

Also, in *The IONIAN PIONEER,* 236 F. 2d 78, 80, 956 A.M.C. 1750, the Fifth Circuit emphasized the situation in the instant case where the Court notes that there is:

"* * * a presumption of unseaworthiness existing at the beginning of the voyage, where machinery, gear, or appliances fail shortly after the beginning of the voyage without accident, stress of weather, or the like, furnishing an adequate explanation as a likely cause. Southwark, 191 U.S. 1, Olancho (S.D.N.Y.), 1953 A.M.C. 1040, 115 F. Supp. 107; Agwimoon (D.C. Md.), 1928 A.M.C. 645, 24 F. (2d) 864 aff'r. (4 Cir.), 1929 A.M.C. 570, 31 F. (2d) 1006.

* * * * * * *

". . . Was the unseaworthiness caused by the owner's failure to exercise due diligence? On this the only serious concern is whether the shipowner ought to have known of these defects because, save for diligence in obtaining certificates of seaworthiness from Helenic or Lloyds classification societies and which is certainly not the test, see KNAUTH, supra, page 187; ABBAZIA (S.D. N.Y.), 127 Fed. 495; Poleric (4 Cir.), 1928 A.M.C. 761, 25 F. (2d) 843, cert. den. 278 U.S. 623; Edgar F. Coney, (5 Cir.), 1934 A.M.C. 1122, 1129, 72 F. (2d) 490; and a few superficial repairs to parts of the steering apparatus, the last of which for the engine was July 12, 1951, and for the telemotor, January 31, 1950, *the record*

is completely silent of any serious inspection an survey of the entire steering machinery befor this charter party voyage began." (Italics sup plied.)

The failure to fully inspect the steering gear an make visual tests and physical tests was like the cas of *The MEANTICUT-BEDFORD,* 65 F. Supp. 20 1946 A.M.C. 178, where the Court commented:

". . . repeatedly turning the wheel and watchin the indicator were not sufficient."

Petitioner's own cases demonstrate a much highe standard in proving due diligence than Petitioner ha here shown. In *The ZAREMBO* (E.D.N.Y.) 44 F Supp. 915, 919, aff'd 136 F. (2d) 320, cert. den. 32 U.S. 804, cited at page 134 Petitioner's Brief, the ship owner shows four specific examinations of the exac plate in the No. 1 Hold which had cracked as well a an examination of both the interior and exterior o that No. 1 Hold immediately prior to the time of th vessel's sailing. In the present case the Petitione has shown no such specific examinations of the are of Voyage VI plate damage.

Further illustration by comparison of Petitioner' lack of due diligence as regards inspections of th steering gears is contained in *The FLORIDIAN* (2 Cir.) 83 F. (2d) 949, 1936 A.M.C. 1006 cited by th Petitioner at page 134. In that case the steering gea was taken apart for close examination.

Petitioner took the testimony of Charles E Matthews, the Chief Engineer on Voyage V who tes

fied (R. 350-351) that he was responsible for the roper functioning of the steering apparatus of the ıip, that he made inspections from time to time of ıe steering gear and that the Oiler also made in-)ections. That this evidence is insufficient to show ıe exercise of due diligence is directly held in the ıse of *The VIZCAYA* (D.C. E. D. Pa.) 63 F. Supp.)8, 904, 1946 A.M.C. 469, 497, where the Court says:

"* * * As to the exercise of due diligence, the only evidence is that the chief engineer 'inspected' the machinery and found everything fit. But this is insufficient, for I feel that information as to the care and extent of the inspection is of vital importance. Thus, it has been held that a visual inspection is 'inadequate'. * * *

In any event, if there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved against the shipowner."

In *The RIDEOUT* No. 7 (California & Hawaiian Sugar Ref. Corp. v. Rideout) (9th Cir.), 53 F. 2d 22, 325, 1931 A.M.C. 1870, Circuit Judge Sawtelle, endering the opinion of this Court says:

". . . In The FELTRE (C.C.A. 9), 1929 A.M.C. 279, 283, 30 F. (2d) 62, 64, Judge Gilbert used the following language:

'To render available an exemption in a contract of carriage from absolute warranty of seaworthiness, the burden of proving the exercise of due diligence rests upon the shipowner. The WILDCROFT, 201 U.S. 378, and it is not sufficient that the shipowner employ competent men to make the inspection. He is held accountable for the failure of the man he employs to discover patent

defects, Int. Nav. Co. v. Farr & Bailey Mfg. Co
181 U.S. 218; The MANITOBA (D.C.), 104 F
145, 151; The PHOENICIA (D.C.), 90 Fed. 11(
Said Mr. Justice Holmes in The GERMANIC, 19
U.S. 589, 596: "But it is a mistake to say, a
petitioner does, that if the man on the spot, eve
an expert, does what his judgment approves, h
cannot be found negligent. The standard of con
duct * * * is an external standard, and takes n
account of the personal equation of the man con
cerned." In The ABBAZIA (D.C.), 127 Fed. 49
496, Judge Adams said that the diligence require
"is diligence with respect to the vessel, not in ob
taining certificates." ' "

On the issue of due diligence petitioner states (Pet
Brief 133): "it is difficult to imagine what more
shipowner could do." Without belaboring the point
it might be pointed out that petitioner, as a ship
owner, could and should have done all of the follow
ing:

(1) Petitioner should have thoroughly in
spected the vessel, in a completely unloaded con
dition, after the Class I casualty of Voyage V
Even petitioner's Marine Superintendent testifie
that a vessel should be completely unloaded for
thorough inspection. This thorough inspectio
should have included a minute examination of al
padeyes and butt welds for small cracks becaus
of the previous cracking of the PENNSYL
VANIA on Voyage V, originating in a smal
padeye crack, and the reported cracking of th
ESSO MANHATTAN, originating in a butt
weld. Such a thorough examination may wel
have disclosed the incipient crack in the butt weld

between frames 93 and 94 which extended to 14 feet during heavy weather on Voyage VI.

(2) Petitioner should have taken affirmative steps to make certain that the steering systems of the PENNSYLVANIA were in fit condition for the weather to be expected by opening them up to check for wear and lack of cleanliness, cleaning and replacing worn parts. Further, the petitioner could and should have taken proper precautions to insure that the jamming of the emergency steering gear by cargo, which occurred on Voyage V, could not reoccur.

(3) Petitioner should have carefully examined the condition of the locking bars, eliminating the bent hatch securing devices on the forward hatches, (which were discovered on Voyage V) in order to insure the security of the forward hatches.

(4) Petitioner should have properly positioned the acid cargo in a more sheltered position than the exposed forward deck area.

s stated in *The REPUBLIC* (S.D.N.Y.) 57 Fed. 40 aff'd (2d Cir.) (1894) 61 Fed. 109:

"The petitioners cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put."

With the evidence and the authorities thus supporting the District Court's Finding VI "that the petitioner did not use the due diligence required by law

to make the vessel seaworthy and to entitle it to ex
oneration from liability" it is apparent that thi
finding is not clearly erroneous.

CONCLUSION.

No matter how many pages of briefs may be writ
ten, no matter how many authorities may be cited, n
matter how many experts may have testified, the clea
plain and inescapable language of the master an
members of the crew of the PENNSYLVANIA tha
came through by radio, point the finger against Pe
titioner of negligence, privity and knowledge of th
very causes which were responsible for the loss o
the PENNSYLVANIA. The Petitioner cannot es
cape full liability here as it did in *The IOWA* (D.C
Oregon), 34 F. Supp. 843, 1938 A.M.C. 615. The miss
ing link in that case is supplied here by the master'
description, in his radio messages, of the faults, fail
ures, breakdowns and defects of the vessel which were
causing the vessel to have her forward holds fill with
water and sink bow first. These messages fully tel
the story, as found by the District Court in its find
ings, that there was no peril of the sea, and that th
cause of the sinking of the PENNSYLVANIA wa
her own unseaworthiness at the inception of her voy
age.

There cannot be any other explanation for the sink
ing of the PENNSYLVANIA which, four days afte
her departure from Seattle, cracked in a main but
weld, had all steering methods fail, had her deck

rgo come adrift and breached forward hatches, took ıter in No. 1 and No. 2 holds, went down by the ·ad and sank in weather survived by sixteen other ·ssels without any substantial damage.

The contributory factors responsible for the sink-g, as found by the District Court, are admitted by e Petitioner in its brief as being factors which may ıve been responsible for the immediate sinking of the S PENNSYLVANIA, but Petitioner contends that ey did not culminate from the condition of the ssel at the inception of her voyage.

The evidence and the authorities cited by the Gov-nment support Findings I, II, III, IV, V and VI the Court, including the finding of the Court that the Petitioner did not use the due diligence required y law to make the vessel seaworthy and to entitle to exoneration from liability."

It must be apparent to the Court that there can be ɔ explanation other than the unseaworthiness of the ENNSYLVANIA prior to leaving the port of eattle which can explain or account for the many ıults, failures, breakdowns and defects set forth in ıe District Court's Finding IV.

All of these conditions were under the jurisdiction f Mr. Vallet, the alter ego of Petitioner, who was sponsible for the manning, operations, and repairs f the PENNSYLVANIA, the duty of proper in-ɔection and repair being delegated to him. The of-cers of the corporation according to the testimony f Mr. J. R. Dant (R. 2624) did not take part in that

branch of the corporation's business, which covere
the operation of its vessels. The act or failure to ac
the knowledge, either actual or constructive, was al
Mr. Vallet's.

Petitioner has suggested to the Court adheren
to the warnings of Mr. Justice Holmes against t
easy a finding of privity in a limitation case, but th
Government suggests that the words of Circuit Judg
Sawtelle of the Ninth Circuit are more applicab
herein, especially where In *RIDEOUT* No. 7, 53 F
2d 322, at 326, he says:

> "From ancient times the men who have had t
> go down to the sea in ships have held themselv
> to high accountability for care in making the
> craft fit to cope with the capricious element
> Though, as we have seen, the shipowner's liabilit
> has been limited by statute, such limitation in h
> favor is to be strictly construed against him,
> he fails to prove his own diligence in making th
> vessel seaworthy.
>
> The good sailor is the careful sailor. If he
> negligent in the respects set forth in the Harte
> Act in guarding the goods and the lives entruste
> to his care, he, or his employer must pay. It
> the law of the sea."

The failure of the Petitioner to properly guard "th
goods and lives entrusted to its care" resulted in on
of the greatest tragedies of the North Pacific in whic
45 men lost their lives and the goods of the claiman
were destroyed. The storms were not the greatest i
years, but as shown by the testimony (see also *Th*

RAKAN, supra, and *The INDIEN,* supra), were e regular winter storms to be expected. This great agedy occurred by reason of the Petitioner taking a alculated risk" in sending *The PENNSYLVANIA,* r which the Petitioner had paid only 25% of its pur- ase price, to what might be called its "foreseeable te" after its No. 1 casualty, in the cold temperatures id rough seas of the North Pacific. For this negli- nce with privity, in the words of Circuit Judge Saw- lle, Petitioner "must pay. It is the law of the sea."

It is respectfully submitted that the District Court's ding denying exoneration should be affirmed and the ding granting limitation should be reversed.

Dated, February 19, 1957.

Respectfully submitted,

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